File: A91 894 196 - Seattle

Date:

FEB 26 1999

In re: JOSE CARLOS ABREGO-CUEVA

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Michael Johnson-Ortiz, Esquire
Johnson-Ortiz & Mainard
601 Union Street, Suite 4317
Seattle, Washington 98101

ON BEHALF OF SERVICE: Tammy L. Fitting
Assistant District Counsel

CHARGE:

Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] - Present without being admitted or paroled

APPLICATION: Cancellation of removal

ORDER:

PER CURIAM. We have jurisdiction over this timely appeal pursuant to 8 C.F.R. § 3.1(b). Removability has been conceded. The only issue on appeal is whether the Immigration Judge correctly found that the respondent had failed to meet the "exceptional and extremely unusual hardship" requirement for cancellation of removal under section 240A(b) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b), and was therefore ineligible for that relief from deportation. We find that the Immigration Judge's resolution of this issue was correct, and dismiss this appeal.

Under section 240A(b)(1) of the Act, the Attorney General may cancel the removal of an alien who is inadmissible or deportable if the alien:

> (A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application;
>
> (B) has been a person of good moral character during such period;
>
> (C) has not been convicted of an offense under section 212(a)(2), 237(a)(2), or 237(a)(3); and

> (D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

On appeal, the respondent contends that he has "met the stringent standard of exceptional and extremely unusual hardship with regard to his daughter Karla Mildred Abrego." The respondent mentions that his daughter will suffer due to the inability of the respondent to support his family in Mexico if the respondent were to be deported from the United States.

We note that the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. No. 104-208, 110 Stat. 3009-546 ("IIRIRA"), amended section 244(a) of the Immigration and Nationality Act. The new cancellation of removal provision of section 240A(b) of the Act applies to aliens placed into proceedings after April 1, 1997, and replaces section 244(a) suspension of deportation. Prior to the enactment of IIRIRA and the new standard of "exceptional and extremely unusual hardship" under section 240A(b) of the Act, an alien had to establish either "extreme hardship" or "exceptional and extremely unusual hardship" depending upon the ground of deportability. Section 244(a) of the Act, 8 U.S.C. § 1254(a); see Matter of Ching, 12 I&N Dec. 710 (BIA 1968). An alien deportable on certain grounds was required to establish, inter alia, 10 years of continuous physical presence and that deportation would result in extreme or exceptionally unusual hardship to him or to a qualifying relative. Id.

Neither the precedents of this Board nor any binding judicial rulings have articulated the precise distinction between "extreme hardship" and the "exceptional and extremely unusual hardship." It is clear, however, that the latter is considered to be a higher standard both by our precedents and by Congress in enacting IIRIRA. See Matter of Ching, supra; Matter of Pena-Diaz, 20 I&N Dec. 841 (BIA 1994); H. R. Conf. Rep. No. 104-828 at 213 ("Joint Explanatory statement") (stating that hardship standard has been "deliberately changed" to "exceptional and extremely unusual hardship" because the standard of "extreme hardship" has been weakened "by recent administrative decisions," and to emphasize "that the alien must provide evidence of harm to his spouse, parent, or child substantially beyond that which ordinarily would be expected to result from the alien's deportation"). The intent of Congress, as manifested in both the plain language of the statute and in this legislative history, was to establish a standard higher than that set forth in Board precedents such as Matter of Anderson, 16 I&N Dec. 596 (BIA 1978); Matter of O-J-O-, Interim Decision 3280 (BIA 1996); Matter of Pilch, Interim Decision 3298 (BIA 1996). In addition, Congress legislated that the showing of hardship must pertain to a qualifying relative of the alien who is either a United States citizen or lawful permanent resident; hardship to the alien himself is no longer a factor.

We believe, however, that this change should be construed to alter the weight that is accorded various hardship factors, not to eliminate or alter the factors themselves. Therefore, we find that the factors developed in the context of relief under the former section 244(a) of the

Act are appropriate factors to be used under section 240A(b) of the Act. See Matter of Anderson, supra (the factors include the age and health of the alien and of his family; his family ties in the United States and abroad; his length of residence in the United States; the economic and political conditions in the country to which the alien is returnable; the financial status of the alien, including his business and occupation; the possibility of other means of adjustment of status; and his immigration history).

The respondent is a 28-year-old native and citizen of Mexico who entered the United States without inspection in 1985 (Tr. at 7-8). The respondent is married to a Mexican citizen who does not have any legal immigration status in this country (Tr. at 9). The respondent has two children, one of which is a United States citizen (Tr. at 9-10). The respondent's parents and seven of the respondent's siblings live in Mexico (Tr. at 19). The respondent, who worked for his father in Mexico, worked here as a cook, a welder and a cleaning person (Tr. at 11). The only property the respondent owns is a trailer (Tr. at 18).

We do not find that the respondent's 1-year-old child, the only qualifying family member under section 240A(b)(1)(D) of the Act, will suffer exceptional and extremely unusual hardship if she accompanies her parents to Mexico. Babai v. INS, 985 F.2d 252, 254-55 (6th Cir. 1993); Cerrillo-Perez v. INS, 809 F.2d 1419, 1426 (9th Cir. 1987). The mere birth of a child in the United States is not sufficient to establish hardship. Davidson v. INS, 558 F.2d 1361 (9th Cir. 1977); Matter of Correa, 19 I&N Dec. 130, 134 (BIA 1984). The respondent's daughter is extremely young and will be able to easily adjust to life in Mexico. The child will not face any cultural or educational problems because she is too young and has not been used to the American way of life. The respondent had worked in Mexico prior to coming here and there is no evidence that he will be unable to support his family in Mexico. The respondent's daughter, however, will face certain problems due to the inferior living conditions. However, these are minor inconveniences which can be overcome with time, and are insufficient to prove the requisite amount of hardship. Hassan v. INS, 927 F.2d 465, 468 (9th Cir. 1991). After having considered individually and collectively all of the hardships which the respondent's daughter would suffer if she departs the United States and returns to Mexico, we conclude that the respondent has not satisfied the requirement of "exceptional and extremely unusual hardship" within the meaning of section 240A(b)(1)(D) of the Act.

Accordingly, the appeal is dismissed.

FURTHER ORDER: Pursuant to the Immigration Judge's order and in accordance with our decision in Matter of Chouliaris, 16 I&N Dec. 168 (BIA 1977), the respondent is permitted to depart from the United States voluntarily within 30 days from the date of this order or any extension beyond that time as may be granted by the district director; and in the event of failure so to depart, the respondent shall be deported as provided in the Immigration Judge's order.

FOR THE BOARD